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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION	Case No. 04-MS-297 (Chief Judge Thomas F. Hogan) (UNDER SEAL)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NON-PARTY TIM RUSSERT'S MOTION TO QUASH GRAND JURY SUBPOENA

Non-party Tim Russert respectfully submits this reply memorandum ("Reply") in support of his motion to quash the subpoena served on him by the Office of Special Counsel ("the Special Prosecutor") to appear and testify before a grand jury in the above-captioned proceeding.

1. **Introduction.** The Special Prosecutor's "Response to Motion to Quash Grand Jury Subpoena" ("Response") is premised on several misconceptions of applicable law. First, the Special Prosecutor argues that a court has no authority to enforce the requirements of 28 C.F.R. § 50.10, despite contrary decisions in this jurisdiction and several others. Second, in the face of three decades of precedent holding otherwise, the Special Prosecutor asserts that, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court rejected the contention that either the First Amendment or federal common law protects a journalist against the compelled disclosure of communications with confidential sources. Third, the Special Prosecutor claims that the subpoena at issue may be quashed only in the face of evidence of "bad faith or harassment," even though Fed. R. Crim. P. 17(c) expressly provides that a federal district court retains ample discretion to quash a grand jury subpoena based on a finding that it is, under the circumstances of a given case, "unreasonable or oppressive." And, finally, the Special Prosecutor contends that, even if he is obliged to carry the burden imposed on him by 28 C.F.R. § 50.10, the First Amendment, and federal common law, he has done so here merely by showing

that "there is some possibility that the information sought by the subpoena is 'relevant to the general subject of the grand jury's investigation.'" Response, at 28 (quoting *United States v. R. Enterprises*, 498 U.S. 292, 301 (1991)).[1] In the pages that follow, we explain why each of these contentions is in error.

2. **28 C.F.R. § 50.10.** In a footnote, the Special Prosecutor suggests that the regulations codified at 28 C.F.R. § 50.10 ("the DOJ Regulations") "do not provide an independent basis for quashing the instant subpoena." Response, at 23 n.11. This Court, however, has already expressly held to the contrary, *see In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 8 (D.D.C. 1996), as have several others, *see In re Williams*, 766 F. Supp. 358, 368-69 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982); *Maurice v. NLRB*, 7 Media L. Rep. 2221, 2224 (S.D.W. Va. 1981), *vacated on other grounds*, 691 F.2d 182 (4th Cir. 1982). The Special Prosecutor is simply wrong when he contends in a parenthetical that, in *In re Grand Jury 95-1*,

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[1] The Special Prosecutor purports to make this showing through an *ex parte* submission, which frustrates Mr. Russert's ability to respond to it meaningfully. *See In re Sealed Case 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (*ex parte* submissions "'generally deprive one party to a proceeding of a full opportunity to be heard on an issue,' and thus should only be used where a compelling interest exists") (citations omitted); *In re Taylor*, 567 F.2d 1183, 1189 (2d Cir. 1977) (*ex parte* and *in camera* proceeding deprives parties "of an opportunity to refute the claims made by the Government"); *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (same). Under the circumstances of this proceeding, where all filings have been and will be made under seal in any event, basic notions of due process require that, at the least, Mr. Russert's counsel be afforded access to the Special Prosecutor's Affidavit subject to appropriate restrictions as to their use of the information contained in it. *See, e.g.*, *Green v. Baca*, No. CV02-4744-MMM (MANX), 2004 WL 1151649, at *1 (C.D. Cal. May 19, 2004) (providing confidential documents submitted *in camera* on "'attorney's eyes' only" basis); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 527 (N.D. Ill. 1999) (same); *Fradette v. American Service Corp.*, No. 76-6373-Civ-CA, 1979 WL 1756, at *4 (S.D. Fla. Aug. 29, 1979) (providing transcripts of grand jury testimony to counsel only). Mr. Russert has authorized his counsel to receive the information subject to such restrictions. Accordingly, he respectfully requests that the Court order the Special Prosecutor to serve a copy of his Affidavit on counsel subject to the condition that it not be shared with Mr. Russert or any third party and that it not be used for any purpose other than in connection with this proceeding.

Judge Penn found that an "Independent Counsel complied with [the Regulations] . . . without addressing whether [a] subpoena could be quashed based on failure to comply" with them. Response, at 23 n.11. In fact, Judge Penn squarely held that this "Court agrees with the journalists' position that these regulatory requirements apply to this case." 59 F. Supp. 2d at 5. Indeed, any contrary conclusion is reasonably foreclosed by the Court of Appeals' decision in *Lopez v. Federal Aviation Administration*, 318 F.3d 242 (D.C. Cir. 2003), which confirms that, in this circuit, a "'court's duty to enforce an agency regulation [, while] most evident when compliance with the regulation is mandated by the Constitution or federal law,' embraces as well agency regulations that are not so required." *Id.* at 247 (quoting *United States v. Caceres*, 440 U.S. 741, 749 (1979)) (alteration in original).[2] Thus, separate and apart from the requirements of the First Amendment, federal common law, or Fed. R. Crim. P. 17(c), the Special Prosecutor is bound by the substantive restrictions on his authority imposed by the DOJ Regulations.[3]

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[2] The Special Prosecutor's contention that judicial enforcement of agency regulations is required only when they confer "'procedural benefits' upon individuals," Response, at 23 n.11, cannot be reconciled with applicable law. *See, e.g.*, *Service v. Dulles*, 354 U.S. 363, 388 (1957) (although Secretary of State "was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them"), *cited in Lopez*, 318 F.3d at 246. Indeed, the only two cases that have purported to hold that the DOJ Regulations are not subject to judicial enforcement base that conclusion on the Supreme Court's decision in *Caceres*, a broad reading of which the Court of Appeals expressly rejected in *Lopez*. *Compare Lopez*, 318 F.3d at 246 *with In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992) (relying on *Caceres*) *and In re Grand Jury Subpoena (American Broad. Co.)*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (relying on analysis in *Shain*).

[3] As the Special Prosecutor concedes, *see* Response, at 24 n.12, the subpoena at issue was not approved by the Attorney General as required by the DOJ Regulations, *see* 28 C.F.R. § 50.10(e), apparently because the Attorney General has recused himself from any participation in this investigation. Even under such circumstances, however, there is no sound reason why the internal review function contemplated by the Regulations cannot and should not be performed by the Deputy Attorney General who, as far as Mr. Russert is aware, has not recused himself. Moreover, especially since it is conceded that there has been no check of any kind within the

3. **The First Amendment.** The bulk of the Special Prosecutor's Response is directed toward his contention that, in *Branzburg v. Hayes*, the Supreme Court purportedly decided that a journalist has no First Amendment-based right to resist the compelled disclosure of his confidential sources or information provided by them in the context of a grand jury subpoena. *See* Response, at 6-22. With all due respect, this is simply not correct. In *Branzburg*, the Supreme Court held only that, absent evidence of harassment or bad faith, the First Amendment affords a journalist no protection from the obligation of all citizens to appear before a grand jury and testify about their eyewitness observations of criminal activity. *See* 408 U.S. at 692.[4] All three journalists in *Branzburg* objected to appearing before the grand jury at all to testify about crimes they observed – *e.g.*, the manufacture of illegal drugs, the unlawful possession of firearms, and specific acts of civil disobedience. As this Court has explained, *Branzburg* therefore stands only for the following, limited proposition:

> Like all other citizens, . . . journalists must appear and answer questions put to them. If the journalists believe that the grand jury's questions are in bad faith or intended to harass them, then they may seek protection from the Court. *Similarly, if the grand jury attempts to learn the journalists' confidential sources – an issue which both parties agree is not presently before the Court – then the journalists*

Department on the Special Prosecutor's decision, this Court should be particularly vigilant in ensuring compliance with the Regulations.

[4] *See also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (In *Branzburg*, "[t]he reporter personally had witnessed the hashish production and was subpoenaed by a Kentucky grand jury to testify about his experience"); *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979) (*Branzburg* is "a case where the reporter witnessed events which are the subject of grand jury investigations into criminal conduct"); *In re Ziegler*, 550 F. Supp. 530, 532 (W.D.N.Y. 1982) ("'All that the *Branzburg v. Hayes*, case decided in a significant way is that reporters who witness a crime must testify as to what they saw.'") (citation omitted); *Capuano v. Outlet Co.*, 579 A.2d 469, 474 (R.I. 1990) (in *Branzburg*, "the Supreme Court held that in a criminal case a news reporter under subpoena could not refuse to testify about the eyewitness observations of crimes committed while he was gathering news"); *In re Grand Jury Proceedings*, 520 So. 2d 372, 375 (La. 1988) ("The vast majority of the courts that have considered this issue after *Branzburg* have read *Branzburg* as merely holding that reporters who witness a crime may be compelled to testify before a grand jury as to whom and what they saw.").

> *also may seek protection from the Court.* Otherwise the journalists must appear and answer questions put to them.

In re Grand Jury 95-1, 59 F. Supp. 2d at 14 (emphasis added); *see also United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (enforcing, in criminal proceeding, reporter's "privilege not to disclose confidential sources").[5]

In this case, the grand jury's entitlement to invade the confidential relationship between a journalist and his source is at issue and its power is circumscribed by the First Amendment protections crafted by this Court and by the Court of Appeals in the years since *Branzburg*, regardless of the nature of the proceedings in which the issue arises. *See, e.g., In re Grand Jury 95-1*, 59 F. Supp. 2d at 14 (grand jury); *Ahn*, 231 F.3d at 36 (criminal proceedings); *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981) (civil proceedings). Put differently, the relevant distinction for present purposes is not, as the Special Prosecutor contends, between grand juries on the one hand, and all other judicial proceedings on the other, but rather between cases – such as this one – in which the government seeks to question a journalist about a confidential relationship with a source, and those cases – like *Branzburg* – in which a journalist, like any other citizen, is obliged to testify about criminal conduct that he observed.[6]

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[5] In this case, where the Special Prosecutor has specified the questions he proposes to put to Mr. Russert before the grand jury, both parties agree that there is a sufficient record to permit this Court to decide the issue in the context of a motion to quash.

[6] Indeed, despite the Special Prosecutor's suggestion to the contrary, *see* Response, at 17 n.8, in *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003), the Seventh Circuit expressly distinguished the claim at issue there – *i.e.*, a journalist's declination to produce the unpublished, but non-confidential portions of a recorded interview with a disclosed source – from the far different issue presented by the compelled disclosure of confidential sources and the information they provide. *See id.* (because it is "obvious that the newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality," the First Amendment has been interpreted to afford a journalist a non-absolute privilege to resist such compelled disclosure).

In this regard, the Special Prosecutor's discussion of the precedential significance of *In re Possible Violations of 18 USC 371, 641, 1503*, 564 F.2d 567 (D.C. Cir. 1977), and *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), is – at the very least – overstated. *See* Response, at 11-13. Neither of those cases considered a journalist's invocation of the First Amendment to protect a confidential relationship with a news source. Rather, *In re Possible Violations* involved a claim by the Director of Public Relations for the Church of Scientology that he had a First Amendment-based right to decline to testify before a grand jury about "'the internal structure of (his) church, its religious tenets or . . . information relating to (his) confidential relationships with persons in the course of the performance of (his) duties.'" 564 F.2d at 569. Even in *dicta*, the Court interpreted *Branzburg* to hold only that a "[n]ewsman can claim no *general immunity*, qualified or otherwise, from grand jury testimony. On the contrary, like all other witnesses, he must appear and normally must answer." *Id.* at 571 (emphasis added). There is no discussion in that decision at all about a journalist's ability to resist compelled disclosure of communications with confidential sources. Similarly, in *Reporters Committee*, the Court had before it only the distinct issue of whether the First Amendment requires that a journalist be given notice when a subpoena is issued to a third-party telephone company for his toll records. *See* 593 F.2d at 1041. Judge Wilkey's observations in *dicta* in that case about the scope of the Supreme Court's decision in *Branzburg* cannot be reconciled either with the limited issue before the Supreme Court or with this Circuit's subsequent *holdings* in cases such as *Ahn* and *Zerilli*.

Indeed, the Supreme Court's jurisprudence since *Branzburg* and *Reporters Committee* reinforces the conclusion that the specific interest asserted by Mr. Russert here – *i.e.*, his right to preserve confidential communications with his sources – is protected by the First Amendment.

See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The Special Prosecutor concedes as much, *see* Response, at 7 n.1, and his effort to diminish the significance of that right paints with too broad a brush. Specifically, the Special Prosecutor contends that a "compelling public interest in investigating crime . . . justifies requiring the disclosure of confidential sources and distinguishes *Branzburg* from other situations where the Supreme Court has protected anonymity." *Id.* In fact, however, as this Court recognized in *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987), even where the asserted governmental interest "is no doubt compelling," it must nevertheless be balanced against the First Amendment-based right to protect a source's anonymity. Indeed, in *Garde* itself, this Court concluded that the First Amendment precluded enforcement of a subpoena that sought to compel disclosure of the identities of whistleblowers despite the government's "compelling" interest in ensuring nuclear safety. *See id.*[7] And, in *In re Grand Jury Subpoena*, 26 Media L. Rep. 1599, 1601 (D.D.C. 1998), this Court held that the very same interest of the grand jury "in investigating crime" invoked by the Special Prosecutor here must be carefully weighed against a bookstore's First Amendment-based right to protect the identities and purchase records of its customers.

Finally, the Special Prosecutor's constricted reading of Justice Powell's concurring opinion in *Branzburg* is not only inconsistent with the great weight of authority in both civil and

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[7] *See also Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 204-05 (1999) (state's "substantial interests" not sufficient to overcome First Amendment right to preserve anonymity); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-68 (2002) (same); *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228, 1232 (N.D. Ga. 1997) (striking down statute restricting anonymous speech despite "compelling state interest" supporting legislation).

criminal cases in this Circuit,[8] and throughout the federal judiciary,[9] it cannot be reconciled either with Justice Powell's own authoritative explanations of the import of that opinion, *see, e.g.*, *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting), or with its plain meaning. Simply out, Justice Powell's concurring opinion in *Branzburg* was expressly

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[8] *See United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972) (opinion of Leventhal, J.) (because "the *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell," court must apply balancing test); *United States v. Hubbard*, 493 F. Supp. 202, 204-05 (D.D.C. 1979) ("the vote which determined the outcome in *Branzburg* was cast by Justice Powell, and his concurring opinion has inspired the courts to engage in a case-by-case balancing of interests in order to determine whether a reporter will be required to testify") (citations omitted); *see also Zerilli*, 656 F.2d at 711 (Justice Powell "cast the deciding vote in Branzburg" recognizing reporter's privilege); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) (*Branzburg* result was "controlled by the vote of Justice Powell") (citation omitted); *NLRB v. Mortensen*, 701 F. Supp. 244, 247 (D.D.C. 1988) (Justice Powell "cast the deciding vote" requiring balancing test).

[9] *See, e.g.*, *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980) (adopting "the formulation in the concurring opinion of Justice Powell in *Branzburg*" and recognizing privilege); *United States v. Foote*, No. 00-CR-20091-01-KHV, 2002 WL 1822407, at *1-2, 30 Media L. Rep. 2469, 2471 (D. Kan. 2002) ("if one aligns Justice Powell's concurring opinion with" the opinions of the dissenters, "a majority of five justices accepted the proposition that journalists are entitled to at least a qualified First Amendment privilege" in criminal cases); *United States v. Markiewicz*, 732 F. Supp. 316, 318 (N.D.N.Y. 1990) (because Justice Powell's concurring opinion "advocates a balancing test in determining whether a reporter should be accorded a privilege . . . in at least one respect, [he] agrees with the four dissenters"); *Blanton*, 534 F. Supp. at 296-97 (same); *see also, e.g.*, *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (citing Justice Powell's opinion for proposition that "reporter's claim of privilege should be judged on a case-by-case basis"); *LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (citing Justice Powell's opinion in holding that "in determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved"); *Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 350 & n.14 (3d Cir. 1985) (noting that Justice Powell indicated that proceeding on a "case-by-case basis, balancing the reporters' rights against the interests of those seeking information" "was precisely the course that lower courts should take"); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 & n.9 (2d Cir. 1982) (because "Justice Powell cast the deciding vote" in *Branzburg*, his reservations about the court's opinion "are particularly important in understanding the decision"); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 & n.13 (1st Cir. 1980) (applying the "constitutionally sensitized balancing test stressed by Mr. Justice Powell" in *Branzburg*). *Cf. In re: Special Proceedings*, Nos. 03-2052 & 04-1383, 2004 WL 1380007, at *6 (1st Cir. June 21, 2004) (First Amendment "require[s] 'heightened sensitivity'" and "invite[s] a 'balancing' of considerations (at least in situations distinct from *Branzburg*)") (citing *Bruno & Stillman, Inc.*, 633 F.2d at 596-99).

intended to "emphasize" what he understood to be "the limited nature of the Court's holding." 408 U.S. at 709 (Powell, J., concurring). In that cause, he underscored his view that each "claim to privilege should be judged on its facts by striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony" and that courts must strike a "balance of these vital constitutional and societal interests on a case-by-case basis." *Id.* at 710 & n.*.

Thus, the Special Prosecutor errs in asserting that Justice Powell intended to limit the First Amendment's reach to subpoenas issued in "bad faith" or for purposes of "harassment." Response, at 3. Indeed, in his concurring opinion in *In re Possible Violations*, even Judge Robinson (who also provided the pivotal vote via his concurring opinion in *Reporters Committee*) expressed a decidedly different view of the import of Justice Powell's opinion:

> The concurring opinion of Justice Powell, who was also the fifth member of the Branzburg majority, rejects an automatic, broadly-applicable First Amendment privilege for reporters, but does suggest case-by-case protection of newsmen in special circumstances. Unlike Justice Stewart in dissent, Justice Powell would initially presume against a privilege, and thus would put the burden on the newsman to show that the specific First Amendment values he seeks to vindicate outweigh the governmental interest in effective functioning of the particular grand jury investigation.

564 F.2d at 571 & n.2 (Robinson, J., concurring) (citing *Liddy*, 478 F.2d at 587 (opinion of Leventhal, J.)).

4. **Federal Common Law.** The Special Prosecutor also takes the position that *Branzburg* precludes judicial recognition and enforcement of a reporter's privilege as a matter of federal common law. *See* Response, at 15-16. To the contrary, the adoption of Rule 501 of the Federal Rules of Evidence three years after the Supreme Court's decision in *Branzburg* expressly empowered the federal courts to craft a federal common law of evidentiary privileges to govern their proceedings, including grand jury proceedings. *See* Fed. R. Evid. 1101(d)(2); *Jaffee v.*

Redmond, 518 U.S. 1, 8 (1996) (holding that federal courts may "define new privileges by interpreting 'common law principles . . . in the light of reason and experience'"); *In re Sealed Case*, 148 F.3d 1073, 1075 (D.C. Cir. 1998) (Rule 501 "'directed federal courts to continue the evolutionary development of testimonial privileges'") (quoting *Jaffee*, 518 U.S. at 9). Not surprisingly, therefore, in the years since *Branzburg*, several federal courts have embraced, as a matter of federal common law, a journalist's right to maintain a confidential relationship with his sources. *See, e.g.*, *Baker v. F&F Investments*, 470 F.2d 778, 784-85 (2d Cir. 1972); *Riley*, 612 F.2d at 715.[10] Most recently, in *McKevitt v. Pallasch*, the Seventh Circuit emphasized the "important point" that the "Constitution is not the only source of evidentiary privileges" and noted particularly that several of its sister circuits had endeavored to "cut the reporter's privilege free from the First Amendment" and recognize a "federal common law privilege for journalists." 339 F.3d at 532.

In the years since *Branzburg*, moreover, the law has developed in a manner that confirms the validity of the federal common law privilege. Thus, when *Branzburg* was decided, only seventeen states had enacted "shield laws" affording journalists a right to maintain confidential relationships with their sources and no state had otherwise purported to recognize such a right as a matter of state law. *See* 408 U.S. at 689 & n.27. Thirty years later, however, thirty-one states and the District of Columbia have adopted shield legislation and virtually every state recognizes the reporter's privilege either by statute or at common law. *See* C.T. Dienes, L. Levine & R. Lind, *Newsgathering and the Law*, §§ 15-1 n.15 (citing the statutes of all thirty-two jurisdictions that have enacted them) & 16-2(a)(2) nn.29-31 (citing cases) (2d ed. 1999 & Cum. Supp. 2003). In analogous circumstances, the Supreme Court has invoked Rule 501 to affirm the validity of a

[10] *See also Bruno & Stillman, Inc.*, 633 F.2d at 596-97; *Criden*, 633 F.2d at 355; *In re Grand Jury Empaneled February 5, 1999*, 99 F. Supp. 2d 496, 499 (D.N.J. 2000).

federal common law privilege where, as here, "the mere possibility of disclosure may impede development of the confidential relationship" deemed to be beneficial by the lion's share of state legislatures and courts. *Jaffee*, 518 U.S. at 10; *see also id.* at 21 ("[i]t is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision" because if "the privilege were rejected, confidential conversations . . . would surely be chilled").

Finally, courts applying the federal common law privilege have properly looked to the state law of the jurisdictions in which they sit for guidance in crafting the scope of its protections. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 146 n.1 (3d Cir. 1980); *Baker*, 470 F.2d at 780. The District of Columbia has not only enacted its own shield law in the years since *Branzburg*, but that statute affords journalists substantial protection against the compelled disclosure of "[a]ny news or information," including the absolute right to resist the compelled disclosure of "the source of any news or information." D.C. Code §§ 16-4702(1)-(2) & 16-4703. *See Gray v. Hoffman-LaRoche Inc.*, 30 Media L. Rep. 2376 (D.D.C. 2002) (invoking D.C. shield law); *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994) (same). This Court can and should look to the law otherwise governing journalists who seek to gather news in the seat of the national government in determining the scope of the federal common law privilege. *Cf. Lee v. United States Dep't of Justice*, 287 F. Supp. 2d 15, 17 (D.D.C. 2003) (rejecting *only* the contention that the provisions of the D.C. Shield Law are *binding* on this Court in civil actions not arising under the laws of the District of Columbia).

5. **Fed. R. Crim. P. 17(c).** The Special Prosecutor's analysis of *Branzburg* and its import is, at bottom, premised on the twin propositions that (1) grand juries are *sui generis* and are not governed by the same standards that apply in other criminal proceedings and (2) as a

result, a grand jury subpoena to a journalist may be quashed only upon a showing "that the grand jury investigation is being conducted in bad faith for the purposes of harassment." Response, at 3. Even apart from the DOJ Regulations, the First Amendment, and the federal common law, however, these contentions are demonstrably incorrect. Fed. R. Crim P. 17(c) fully applies in the context of a grand jury proceeding and empowers a federal court to quash a subpoena whenever, under the circumstances of a given case, it is either "unreasonable" or "oppressive." *See R. Enterprises*, 498 U.S. at 299 (in grand jury context, "the focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c), which govern the issuance of subpoenas *duces tecum* in federal criminal proceedings" and provides that "'[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive'") (quoting Rule 17(c)).

More importantly, as the Court of Appeals has made clear, the Special Prosecutor's distinction between subpoenas issued in the grand jury and criminal trial contexts, which he purports to derive from the Supreme Court's decision in *R. Enterprises*, *see* Response, at 5-6, is of no relevance in the context of this case. "*R. Enterprises* concerned a challenge to a grand jury subpoena only on the grounds of relevance; it does not govern a case, such as this, where the grand jury subpoena is being resisted on grounds of privilege." *In re Sealed Case*, 121 F.3d 729, 755 (D.C. Cir. 1997). *See also id.* at 756 ("*R. Enterprises'* emphasis on the special leeway given to grand jury subpoenas as opposed to criminal trial subpoenas absent a claim of privilege does not preclude us from finding that the same need standard applies when the presidential communications privilege is asserted.").[11]

[11] Indeed, despite the Special Prosecutor's suggestion to the contrary, *see* Response, at 14, several courts – in addition to the Third Circuit in *In re Williams* – have quashed grand jury subpoenas to safeguard a journalist's confidential relationship with his sources. *See, e.g., In re*

6. **The Subpoena at Issue.** The subpoena at issue cannot withstand scrutiny under the DOJ Regulations, the First Amendment, or federal common law. As the Special Prosecutor concedes, the DOJ Regulations proceed from the premise that a grand jury subpoena may not properly be enforced against a journalist unless "'the information sought is *essential* to a successful investigation – particularly with reference to establishing guilt or innocence.'" Response, at 24 (quoting 28 C.F.R. § 50.10(f)(1)) (emphasis added). Similarly, in *United States v. Ahn*, the Court of Appeals held that, in a criminal proceeding, no such subpoena may be enforced under the law of this circuit unless the reporter's testimony is "'essential and crucial'" to a successful prosecution. 231 F.3d at 37 (quoting district court).[12]

Grand Jury Subpoenas, 8 Media L. Rep. 1418, 1420 (D. Colo. 1982); *In re Grand Jury Proceedings*, 530 So. 2d at 374; *In re Grand Jury Subpoenas*, 5 Media L. Rep. 1153, 1153 (Tex. Dist. 1979); *cf. In re Grand Jury Empaneled Feb. 5, 1999*, 99 F. Supp. 2d at 501 (enforcing grand jury subpoena for non-confidential audiotape of interview, but holding that qualified privilege applies in grand jury context). By the same token, none of the cases the Special Prosecutor cites for the contrary proposition, *see* Response, at 14, involved the compelled disclosure of confidential communications between a journalist and a source. *See In re Grand Jury Proceedings*, 5 F.3d 397, 398-400 (9th Cir. 1993) (enforcing grand jury subpoena to graduate student to testify about conversations with house guests); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992) (enforcing grand jury subpoena seeking videotapes and corporate records of companies believed to be involved in producing obscene material); *In re Grand Jury Proceedings*, 810 F.2d 580, 582 n.4 (6th Cir. 1987) (enforcing grand jury subpoena for outtakes of broadcast footage shot at a public location in the absence of a contemporaneous promise that the identities of the persons videotaped would be maintained in confidence); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) (enforcing subpoena in criminal prosecution seeking non-confidential broadcast outtakes and expressly distinguishing it from cases involving confidential sources and information); *In re Grand Jury Subpoena (American Broad. Co.)*, 947 F. Supp. at 1316 (enforcing grand jury subpoena for non-confidential broadcast outtakes).

[12] The Special Prosecutor's suggestion that *Ahn* was in fact a civil proceeding involving a "'breach of contract issue'" cannot survive a review of either the Court of Appeal's decision or the ruling of this Court that preceded it. *Compare* Response, at 20 *with Ahn*, 231 F.3d at 35 (adjudicating motion to withdraw guilty plea in criminal case) *and* Declaration of Lee Levine Ex. K at 55-56 (reviewing claim that testimony was "crucial" because "it goes to a Motion to Withdraw a guilty plea, which certainly affects Mr. Ahn's freedom"). In addition, the Special Prosecutor's effort to distinguish *Ahn* as "limited to the application of the reporter's privilege in

In this case, the Special Prosecutor has effectively conceded that he cannot make such a showing. *See* Response, at 27-28. Rather, he argues that he should not be "required to show that information [he seeks] is 'crucial' to establish guilt or innocence, or even probable cause, in order to be 'essential' to the investigation." *Id.* at 27. In that cause, he contends that the word "crucial" should be ignored entirely and the word "essential" should be redefined to mean that "there is some possibility that the information sought by the subpoena is 'relevant to the general subject of the grand jury's investigation and not merely 'peripheral' or 'speculative.'" *Id.* at 28 (citations omitted). In fact, the words "essential and crucial" are effectively synonyms and, by any reasonable definition, they require a showing that the information sought is "vital" or "indispensable" to a successful prosecution. *See* American Heritage Dictionary of the English Language (4th ed. 2000).[13] Thus, the Special Prosecutor's only contention here – *i.e.*, that there is at best "a real possibility that the information sought will be relevant, and of substantial importance, to the investigation" he is conducting, Response, at 29 – fails to satisfy the applicable standard.

In addition, an assessment of the competing interests demonstrates that the subpoena at issue is, on balance, both "oppressive" and "unreasonable" within the meaning of Fed. R. Crim. P. 17(c). Although we have not been favored with the Special Prosecutor's *ex parte* submission, the text of his Response confirms that he does *not* contend that Mr. Russert possesses any information about the source of the "leak" of Ms. Plame's identity and employment status.

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the context of a defendant's motion to withdraw a plea of guilty based on breach of the plea agreement," Response, at 20, proves too much – by the same logic, the Special Prosecutor must concede that *Branzburg* rejects the privilege only in the limited context of eyewitness observations of criminal activity.

[13] Indeed, some dictionaries define "crucial" to mean "essential." *See, e.g.*, Merriam Webster's Collegiate Dictionary (11th ed. 2003).

Indeed, Mr. Russert has sworn under oath that he was not a recipient of such a leak. *See* Declaration of Tim Russert ("Russert Decl.") ¶ 6. Thus, from what we can glean from the Special Prosecutor's Response, it appears that Mr. Russert's testimony is sought solely because the Special Prosecutor believes that his recollection of a telephone conversation with an Executive Branch official is inconsistent with that official's statements in this proceeding regarding his recollection of the same conversation. *See* Response, at 31-35. Apparently, the Special Prosecutor has concluded that such a discrepancy may properly form the basis of a prosecution for "obstruction of justice" and/or "perjury" and that Mr. Russert's testimony would, in that sense, "constitute direct evidence relating to guilt or innocence." *Id.* at 32. In striking the appropriate balance between the competing interests in this case, the Court can and should properly assess the relative significance of this specific asserted "interest in law enforcement," which would appear to pale in comparison both to the purpose for which the Special Prosecutor was appointed (to prosecute those responsible for the unauthorized disclosure of the identity of a covert CIA operative) and to the cases on which he now relies. *See* Response, at 31-32 (citing *United States v. Kiszewski*, 877 F.2d 210, 214 (2d Cir. 1989); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)).[14]

By the same token, Mr. Russert's and society's interest in preventing compelled disclosure in this case is at its zenith. This is not a case in which a journalist seeks to avoid testifying about his eyewitness observation of a crime being committed. *See Branzburg*, 408

[14] In *Kiszewski*, the defendant's false testimony to two grand juries and a trial court resulted in two acquittals in an extortion prosecution. 877 F.2d at 212. The court held that the false testimony "was particularly damaging" because the defendant's unsolicited complaint to the FBI initiated "a lengthy investigation and prosecution that he later nullified." *Id.* at 214. Similarly, *Hazel-Atlas Glass Co.* involved a "deliberately planned and carefully executed scheme to defraud" a Court of Appeals, the Patent Office, and an opponent in a civil trial. 322 U.S. at 245.

U.S. at 667-679. It is not a case in which a journalist's source allegedly disclosed to him information or materials in violation of the law. *See In re: Special Proceedings*, Nos. 03-2052 & 04-1383, 2004 WL 1380007, at *1-2; *Lee*, 287 F. Supp. 2d at 16, 19-20. It is not even a case in which a journalist seeks to safeguard his unpublished but non-confidential work product from compelled disclosure. *See, e.g.*, *McKevitt*, 339 F.3d at 532-33. Rather, it is a case in which compelling a journalist to testify would strike at the heart of his ability to maintain a confidential relationship with his news sources:

> [I] understand that, through this subpoena to me, the Special Prosecutor seeks to compel me to testify that I communicated with a specific Executive Branch official on or about July 10, 2003, and to disclose the contents of any such communications. *I cannot provide such testimony without violating the understanding that I share with my sources that our communications, including the fact that we have communicated at all, will be held in confidence.* As a result, I can neither confirm that I had any substantive communication with the public official at issue during the relevant time period nor can I describe the nature of any discussions that we may have had.

Russert Decl. ¶ 6 (emphasis added).[15] Indeed, the intrusion inherent in such compelled disclosure is magnified to the extent that it ventures beyond what Mr. Russert allegedly said to third parties to encompass information provided to him in confidence by a source.

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[15] Thus, despite the Special Prosecutor's somewhat curious suggestion to the contrary, *see* Response, at 14 n.7, it is undisputed that Mr. Russert cannot answer the questions that the Special Prosecutor seeks to pose "without violating the understanding that I share with my sources that our communications, *including the fact that we have communicated at all*, will be held in confidence," Russert Decl. ¶ 6 (emphasis added). In addition, in this case, the after-the-fact "waiver" executed by a journalist's suspected sources cannot reasonably be analogized to the on-the-record interview granted by the non-confidential source in *McKevitt*. *See* Response, at 33. Simply put, in the latter case, the journalist did not and could not claim a confidential relationship with the source because no such relationship was ever established; in this case, in contrast, Mr. Russert has testified that he cannot provide the testimony sought by the Special Prosecutor's subpoena without abandoning his privilege to maintain a pre-existing confidential relationship with his sources. That privilege can be waived only by the journalist as a matter of law. *See Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984).

In addition, an order from this Court compelling a nationally prominent journalist to testify before a grand jury in a matter that has already become a subject of intense public concern will inevitably have a substantial chilling effect on other journalists and their sources. To be sure, Mr. Russert is entitled to no special protection from compelled disclosure, but it would blink reality to ignore the fact that an order compelling this journalist to testify against his will would inevitably have a profound impact on the free flow of information about matters of public concern.[16] With all due respect to the Special Prosecutor, therefore, any fair weighing of the competing interests in this instance tips heavily in Mr. Russert's favor. In the last analysis, judicial enforcement of the subpoena at issue would exact too high a price from the "public's interest in the free dissemination of ideas and information" for too slight a potential gain in vindicating its "interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

[16] The Special Prosecutor's reference to Mr. Russert's broadcast interview of former Executive Branch official Richard Clarke, *see* Response, at 33 n.13, is, to say the least, puzzling. Apparently, the Special Prosecutor contends that Mr. Russert in some sense "waived" the reporter's privilege when he asked Mr. Clarke about the widely publicized fact that he had provided a background briefing to several journalists in August 2002. In fact, Mr. Russert had no privilege on that occasion to "waive" since there is no contention that he was one of the journalists to whom Mr. Clarke spoke "on background" almost two years earlier and, prior to the interview, Mr. Clarke's role in the briefing had already been the subject of dozens of press reports in any event.

CONCLUSION

For the foregoing reasons, and for those set forth in his memorandum filed in support of his Motion to Quash Grand Jury Subpoena, non-party movant Tim Russert respectfully requests that the subpoena issued to him to testify before the grand jury in this proceeding be quashed in its entirety.

Dated: June 23, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of June 2004, I caused a true and correct copy of the foregoing Reply Memorandum of Points and Authorities in Support of Non-Party Tim Russert's Motion to Quash Grand Jury Subpoena to be served via facsimile and Federal Express next day delivery upon:

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